Annamalai a/l Subramaniam v V Muthusamy & Tan (sued as a firm)

HIGH COURT (PENANG) — ORIGINATING SUMMONS NO 24-57 OF 1998
JEFFREY TAN J
23 AUGUST 1999

Land Law *— Sale of land — Stakeholder — Demand for return of issue document of title — Issue document of title handed to solicitor as stakeholder — Sale and purchase agreement terminated — Whether stakeholder could hold on to the title for sub-purchasers*

The plaintiff agreed to sell a piece of land to the purchasers and the plaintiff delivered a duly executed Form 14A memorandum of transfer and the issue document of title ('IDT') to the defendant as stakeholders for the transaction. The purchasers failed to pay the balance purchase price and solicitors for the plaintiff informed the defendant of the termination of the agreement. The plaintiff demanded the return of the IDT but the defendant failed and refused to do so. The defendant contended, inter alia, that the redemption sum had been paid to the chargee of the land and that one of the purchasers had assigned her interest in the land to the other purchasers. Further the land had, with the knowledge of the plaintiff, been subdivided and sold to sub-purchasers. The plaintiff himself was a sub-purchaser of a few plots. The sub-purchasers had instructed the defendant not to return the IDT to the plaintiff so as to protect their interest.

Held, allowing the plaintiff's claim and ordering the defendant to return the IDT:

(1) The sole question for determination was whether the defendant could resist the plaintiff's claim for the return of the IDT. Neither party asserted that the IDT was entrusted to the defendant to protect the rights of the sub-purchasers. There was thus no mandate for the defendant to retain possession of the IDT and the defendant must act within its mandate (see pp 545G, 546B–C).

(2) With the return of the Form 14A to the plaintiff, the defendant lost its mandate to retain possession of the IDT as there was no longer a dealing to be registered. All authority for the defendant to hold the IDT evaporated with the return of the Form 14A (see p 546E–F, G–H).

(3) It was not for the defendant, a non-contracting party and solicitors to both the vendor and purchasers, to assert that the agreement had not been terminated. It was wrong for the defendant to take up the cudgel for the purchasers who had not challenged the termination of the agreement, or for the sub-purchasers who had no privity of contract with the plaintiff (see p 545H, H–I).

[Bahasa Malaysia summary

Plaintif bersetuju menjual sebidang tanah kepada pembeli-pembeli dan plaintif menghantar-serah suatu Borang 14A memorandum pindahan dan dokumen hakmilik ('DH') yang dilaksanakan sewajarnya kepada defendan sebagai pemegang amanah untuk transaksi tersebut. Pembeli-pembeli gagal membayar baki harga belian dan peguamcara plaintif memaklumkan penamatan perjanjian tersebut kepada defendan. Plaintif menuntut pengembalian DH tetapi defendan gagal dan enggan berbuat demikian. Defendan berhujah, antara lain, bahawa jumlah penebusan telah dibayar kepada pemegang gadaian tanah tersebut dan bahawa salah seorang pembeli telah menyerahhak kepentingannya dalam tanah tersebut kepada pembeli-pembeli lain. Tambahan pula, tanah itu telah, dengan pengetahuan plaintif, dibahagikan semula dan dijual kepada pembeli-pembeli kecil. Plaintif sendiri merupakan pembeli kecil beberapa plot. Pembeli-pembeli kecil tersebut telah mengarahkan defendan supaya tidak mengembalikan DH kepada plaintif demi melindungi kepentingan mereka.

Diputuskan, membenarkan tuntutan plaintif dan memerintah supaya defendan mengembalikan DH:

(1) Satu-satunya soalan untuk penentuan adalah sama ada defendan boleh menentang tuntutan plaintif untuk pengembalian DH. Tiada pihak yang menyatakan bahawa DH telah diamanahkan kepada defendan untuk melindungi hak-hak pembeli-pembeli kecil. Justeru itu tiada mandat untuk defendan mengekalkan pemilikan DH tersebut dan defendan mestilah bertindak dalam lingkungan mandatnya (lihat ms 545G, 546B–C).

(2) Dengan pengembalian Borang 14A kepada plaintif, defendan telah kehilangan mandatnya untuk mengekalkan pemilikan DH kerana tiada lagi terdapat suatu urusan untuk didaftarkan. Segala kuasa untuk defendan memegang DH hilang dengan pengembalian Borang 14A (lihat ms 546E–F, G–H).

(3) Bukanlah untuk defendan, suatu pihak yang tidak berkontrak and peguamcara untuk pihak kedua-dua penjual dan pembeli, untuk menyatakan bahawa perjanjian tersebut telah tidak ditamatkan. Adalah salah untuk defendan bercampur tangan bagi pihak pembeli yang tidak mencabar penamatan perjanjian tersebut, atau untuk pembeli-pembeli kecil yang tidak mempunyai sebarang priviti kontrak dengan plaintif (lihat ms 545H, H–I).]

Notes

For cases on stakeholder generally, see 8(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3799–3804.

A **Cases referred to**

Lee Yoke Chye v Toh Theam Hock & Co [1987] 1 MLJ 122 (refd)
Samat Din & Partners (disaman sebagai sebuah firma) lwn Bank Pembangunan (M) Bhd [1997] 3 MLJ 542 (refd)

B *VM Mohan* (*VM Mohan Fareed & Co*) for the plaintiff.
V Muthusamy (*V Muthusamy & Tan*) for the defendant.

Jeffrey Tan J: This is an action by the registered proprietor ('the plaintiff') of land held under GM 35 ('GM 131') for Lot 628, Mukim 11, Seberang Perai Tengah, Pulau Pinang ('the said land') against a firm of solicitors ('the
C defendant') for the return of the issue document of title to the said land.

The plaintiff swore, by affidavit (encl 1) affirmed on 12 January 1998, as follows. He is the registered proprietor of the said land. By a written agreement ('the agreement') dated 23 September 1978 (encl 1 exh 'AS-1') and for the consideration set out therein (RM280,000), he agreed to sell the whole of the said land to Loo Kim Chai, Kwat Kheat Sun, Goay Yew
D Choon, Amathavaly a/p Samynathan and Tan Boon Thuah @ Tan Kiow Chuah ('the purchasers'). The defendant was retained to handle that transaction. He delivered, as was required by the agreement, a duly executed memorandum of transfer together with the issue document of title ('the title') to the defendant as stakeholders for safekeeping. The purchasers
E failed to pay the balance purchase price. He was advised of his right, pursuant to cll 5 and 6 of the agreement, to terminate the agreement and to forfeit a portion of the monies paid. By reason of the purchasers' default to pay the balance purchase price, his solicitors (Messrs VM Mohan, Fareed & Co) notified the defendant, by letter dated 25 September 1997 (encl 1 exh AS-3), of the termination of the agreement and demanded the return of
F the title from the defendant. On 29 October 1997 and 5 January 1998 (see encl 1 exhs AS-4 and AS-5), his solicitors again demanded the return of the title. The defendant failed to return the title to the plaintiff. There is no defence to his action.

The defendant admitted, in the affidavit (encl 4) affirmed by one Dato' V Muthusamy, that the plaintiff is the registered proprietor of the said land,
G that the plaintiff agreed to sell the whole of the said land to the purchasers, that the purchasers failed to pay the balance purchase price, that Messrs VM Mohan, Fareed & Co notified the defendant of the termination of the agreement and demanded the return of the title from the defendant, that Messrs VM Mohan, Fareed & Co demanded for the return of the title on
H two other occasions, and that the defendant had not returned the title to the plaintiff.

The defendant contended however, in the same said encl 4, that one of the purchasers (Amathavaly a/p Samynathan) assigned all her interest to the other four purchasers, that the defendant was appointed only to act for the purchasers, that the defendant acted for the plaintiff with regard to the
I redemption of the said land from Koay Brothers Sdn Bhd, that there was no provision requiring the plaintiff to deposit the title with the defendant as stakeholders, that when the agreement was executed the title was in the

possession of Koay Brothers (the chargee), that Koay Brothers only handed the title to the defendant after their receipt of the redemption sum, and that the plaintiff agreed to the defendant's safekeeping of the title to facilitate the purchasers' application of the sub-division of the said land.

The defendant contended furthermore as follows. The purchasers sub-divided the said land and sold 'plots' to sub-purchasers. The plaintiff who purchased plots 18, 19, 20 and 61 (see encl 4 exh DVM 3A-D) knew of those sub-sales. The agreement (encl 1, exh AS-1) provided that the purchasers shall pay to the plaintiff the sum of RM80,000 within two weeks of the registration of the transfer of the said land unto the purchasers and the balance sum within four months from the date of payment of the said RM80,000. On 25 April 1979, the purchasers paid a sum of RM127,766 to the plaintiff (encl 4 exh DVM-4). The purchasers paid a further sum of RM22,400 towards the redemption of the said land (encl 4 exh DVM-5) and other sums (encl 4 exhs DVM-6 and DVM-7) to the plaintiff. Only RM63,234 was unpaid. The plaintiff admitted that only RM50,000 was unpaid. The transfer could not be registered because of existing encumbrances and because the memorandum of transfer had been returned to the plaintiff. The transfer could not be registered expeditiously because the plaintiff and purchasers would not follow instructions. The defendant did not receive any co-operation from the plaintiff. The plaintiff has no right to forfeit a portion of the monies paid or to a declaration that the agreement had been terminated. Time is no longer of the essence, by reason of the various payments accepted by the plaintiff and also by reason of the conduct of the plaintiff. Contrary to the allegation contained in the letter of Messrs Annamalai & Co to the defendant, 'Defendan tidak pernah menerima sebarang wang jual beli antara pembeli-pembeli asal dan plaintif mahupun di antara sub-sub pembeli dan pembeli-pembeli asal'. All matters relating to the payment of the purchase price were transacted directly between the plaintiff and purchasers. The defendant did not intentionally refuse to return the title. The sub-purchasers instructed the defendant not to return the title, to protect their interest. The defendant did not return the title to protect the interest of those sub-purchasers. If the title were returned, the sub-purchasers would have to bear the loss. On the other hand, the plaintiff who had already received a large sum and several plots would not be prejudiced.

The plaintiff replied, in his affidavit affirmed on 3 August 1998 (encl 5), which was the last of the affidavits filed, as follows. The defendant gave his undertaking that the balance purchase price would be paid (encl 5 exh AS-1). The title was handed to the defendant for the purpose of the discharge of the charge in favour of Koay Brothers. After the discharge of the charge, the defendant failed to return the title, despite the plaintiff's demands (see encl 5 exh AS-2). The plaintiff entered into the agreements (encl 4 exh DVM 3A-D) purchasing plots 18, 19, 20 and 61 to set-off the cash payment of RM48,000. The agreement (encl 1, exh AS-1) was prepared by the defendant. He entered into the agreement without a full understanding of the terms. He was advised that the agreement was 'tidak adil dan berat sebelah'. In total, he received RM102,766. The payment of RM10,000 by cheque No 229802 was returned to Loo Kim Chai and Kuat

A Kheat Sun. The payment of RM80,000 was a set off against the purchase of plot 26 by Arumugam s/o Packirisamy. He did not receive the sum of RM45,000 under receipts dated 16 August 1979, 20 August 1979, 20 September 1997 and 26 October 1997. The signatures on those receipts were not his signatures. Five cheques, each for RM21,000, were dishonoured. Only the memorandum of transfer was returned. The B purchasers should settle the balance within a reasonable time. He did not enter into any agreements with the sub-purchasers, and he is entitled, because of the purchasers' failure to pay the balance purchase price, to the return of the title.

With regard to the submission of learned counsel, Mr VM Mohan for C the plaintiff agreed that the redemption sum of RM22,400 was furnished by the purchasers. However, he said that the full purchase price was not paid. The agreement was terminated, and the defendant was demanded of to return the title. That the defendant did not do, until today.

However, Dato' V Muthusamy disagreed that the agreement had been D terminated. He contended that the notice of termination ought to have been sent to the purchasers and not to him. But he conceded, albeit his denial in his affidavit, that he acted for both the plaintiff and the purchasers. And he said, with regard to the relief sought by the plaintiff, 'I leave it to the court. But there are sub-purchasers and they are objecting to the title being handed over to the plaintiff'. Submitting *Lee Yoke Chye v Toh Theam Hock* E *& Co* [1987] 1 MLJ 122, Mr Mohan replied that there was no privity between the plaintiff and the sub-purchasers.

Now, to get down to brass tacks, both sides agreed that the title is with the defendant who refused, despite the several demands of the plaintiff, to return the title to the plaintiff. Both sides also agreed that the full purchase F price has not been paid, albeit the agreement was made in 1979. However, the plaintiff contended whilst the defendant refuted that the agreement had been terminated. The defendant also contended that there was no provision requiring the plaintiff to deposit the title with the defendant as stakeholders, and that the plaintiff had agreed to the defendant's safekeeping of the title to facilitate the purchasers' application of the sub-division of the said land.

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It should be said, at the onset, that the question is not whether the agreement had or had not been terminated. The sole question for determination is whether the defendant may successfully resist the plaintiff's claim for the title (*Samat Din & Partners (disaman sebagai sebuah firma) lwn Bank Pembangunan (M) Bhd* [1997] 3 MLJ 542). In that H connection, the mandate to the defendant is infinitely relevant. Anyway, it was not for the defendant, a non-contracting party, to say that the agreement had not been terminated. Also, it was most improper of the defendant, who were solicitors for both vendor and purchasers and so should remain neutral, to take the side of one against the other. Indeed, it was totally wrong of the defendant to take up the cudgel for the purchasers I who themselves had not challenged the termination of the agreement, or for the sub-purchasers who themselves had not contracted with the plaintiff, against the plaintiff.

And what was the mandate to the defendant? The plaintiff contended that he delivered a duly executed memorandum of transfer together with the title to the defendant as stakeholders for safekeeping, and that the title was handed to the defendant for the purpose of the discharge of the charge in favour of Koay Brothers. The defendant contended, however, that there was no provision requiring the plaintiff to deposit the title with the defendant as stakeholders, that Koay Brothers handed the title to the defendant after their receipt of the redemption sum, and that the plaintiff agreed to the defendant's safekeeping of the title to facilitate the purchasers' application of sub-division of the said land. Quite evidently, both the plaintiff and the defendant did not say that the title was entrusted to the defendant, to protect the interest of sub-purchasers. Then, there was no mandate to the defendant to retain the title to protect the interest of sub-purchasers, and the defendant could not contend, even on the coat-tails of the sub-purchasers, that they did not return the title to protect the interest of sub-purchasers. Regardless of the motive, the defendant could not play God with the title. The defendant must act within mandate.

The mandate, quite clearly, was to present the memorandum of transfer for registration. The agreement provided, rather unusually, that the balance sum (RM240,000) shall be paid after registration of transfer to the purchasers. Surely for that reason, the agreement (cl 4) provided that the plaintiff, upon execution of the agreement, shall execute a memorandum of transfer and shall present it for registration. Consequently, the memorandum of transfer delivered by the plaintiff to the defendant was to have been presented for registration, and the title, after registration of the transfer, would be the property of the purchasers accordingly. Obviously, the title would not be returned to the plaintiff. But the defendant did not present the transfer for registration. Rather, on 24 December 1987, the defendant returned the memorandum of transfer to the plaintiff. But with the return of the memorandum of transfer, the defendant lost the mandate to retain the title anymore, as there was no longer a dealing to be registered and consequently no memorial of registration to be made on the title. Also, with the return of the memorandum of transfer, the defendant relinquished whatever mandate (if any) to keep the title 'to facilitate the purchasers' application of the sub-division of the said land', as the purchasers would not be registered as proprietors and there would not be any purchasers' application of the sub-division of the said land. Effectively, all authority to the defendant to hold the title evaporated with the return of the memorandum of transfer. Accordingly, the defendant is ordered to deliver up the title to the plaintiff.

Order accordingly.

Reported by Andrew Christopher Simon